STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2014
v	No. 315248 Wayne Circuit Court
CARLOS DENNIS FINLEY, also known as CODY SPERMENT, Defendant-Appellant.	LC No. 12-009626-FC

Before: O`CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of carjacking, MCL 750.529a, unlawful driving away of an automobile, MCL 750.313, and receiving and concealing a stolen automobile, MCL 750.535(7).[1] Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 15 to 30 years' imprisonment for the carjacking conviction and 46 months to 15 years' imprisonment for the unlawful driving away of an automobile and receiving and concealing a stolen automobile convictions. We affirm.

Defendant first contends that his right to due process was violated by the admission of identification evidence that was the result of an unduly suggestive lineup. We disagree.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). The trial court's decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

A defendant's right to due process may be violated when a lineup is so suggestive that it is conducive to irreparable misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances

[1] Defendant was also charged with, and acquitted of, armed robbery, MCL 750.529, and possession of a firearm when committing or attempting to commit a felony, MCL 750.227b.

that it led to a substantial likelihood of misidentification." *Kurylczyk*, 443 Mich at 302. The remedy for an impermissibly suggestive pretrial procedure is the exclusion of testimony concerning that identification at trial. *Id.* at 303. But in-court identification testimony by the same witness will be permitted if an independent basis for the identification can be established that is untainted by the suggestive pretrial procedure. *Id*. Where, as in this case, counsel was present at the lineup, defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

A witness's identification of a defendant is the product of an impermissibly suggestive lineup when the differences between the defendant and the other individuals in the lineup lead to "a substantial likelihood of misidentification." *Kurylczyk*, 443 Mich at 305. But a lineup that is suggestive is not necessarily constitutionally defective. "Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification." *Id*. at 306. Factors courts should review when determining the likelihood of misidentification include the opportunity of the witness to view the perpetrator at the time of the crime, "'the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.'" *Id*., quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972). Generally, differences in physical appearance between a suspect and other lineup participants do not alone render an identification procedure impermissibly suggestive. *Id*. at 312.

Defendant was twice identified as the perpetrator from a lineup in which he and five other men were viewed separately by the complainants, Keith Easley and Crystal Monique Love. In the record of the lineup, defendant was listed as 23 years old, 6 feet tall, and 190 pounds. The other five men in the lineup were ages 20, 26, 32, 34, and 39. The other men ranged in height from 5' 6" to 5' 10" tall. Further, the men ranged in weight from approximately 150 pounds to 215 pounds. All six of the men in the lineup, defendant included, were described as having a medium complexion. Officer John Berryman testified at the hearing that he told Easley, "We've got a lineup. There may or may not be somebody in there you recognize. If you recognize somebody tell me what you recognize them from and what they did." Rita White, a neutral attorney appointed to ensure the fairness of the lineup, stated that she found nothing wrong with the procedures used in conducting the lineup.

Based upon the evidence presented at the suppression hearing, we conclude that the trial court did not clearly err in admitting the identification evidence because there was no substantial likelihood of misidentification resulting from the pretrial identification procedure. The lineup was comprised of men both younger and older than defendant, included men that were within a few inches of defendant's height and generally of the same weight and build as defendant. Further, all of the participants had the same complexion as defendant. Any minor physical differences in appearance between defendant and other lineup participants did not render the lineup impermissibly suggestive. Finally, the police never told Easley that a possible suspect was in the lineup and an independent attorney found the lineup procedures appropriate.

Additionally, the evidence supports that Easley did not misidentify defendant. *Kurylczyk,* 443 Mich at 306. Easley testified that he clearly saw defendant during the carjacking because the parking lot where the offense occurred was well lit by streetlights. Easley's description of

the perpetrator—a 5' 10" tall man with a medium complexion and short hair—was substantially similar to defendant's actual appearance. Further, the lineup procedure was completed within approximately 36 hours of the carjacking, and Easley was very confident that he had identified the man who had carjacked him. Therefore, the trial court did not commit clear error in finding the lineup was not impermissibly suggestive and in admitting the identification evidence.

Finally, even if the lineup procedure were impermissibly suggestive, Easley established an independent basis for his in-court identification of defendant. See *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998), quoting *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), and discussing eight factors to review in determining if an independent basis exists for an in-court identification.

In this case, although Easley did not claim to know defendant before the carjacking, he testified that he clearly saw defendant on the night of the incident because the parking lot was well-lit with street lights. The lineup procedure occurred within approximately 36 hours of the carjacking. Easley's prior description of defendant was substantially correct when compared to defendant's actual appearance, and Easley never named anyone else as a possible suspect before identifying defendant. And, finally, Easley never stated that he was so scared during the carjacking that his memory of defendant's appearance may have been affected; in fact, he was "very confident" that his identification was correct. We conclude that regardless of the pretrial identification, the totality of circumstances supports that Easley had an independent basis for his in-court identification of defendant. *Gray*, 457 Mich at 115-116.

Defendant next contends that the trial court erred in admitting the AK-47 clip into evidence because the prosecutor did not establish any connection between it and defendant, and its prejudicial effect outweighed any probative value it may have. We disagree.

This Court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). Any underlying questions of law are reviewed de novo. *Gursky*, 486 Mich at 606. Findings of fact by the trial court preliminary to the admission or exclusion of evidence are reviewed for clear error. MRE 104; MCR 2.613(C).

As a general rule, relevant evidence is admissible and irrelevant evidence is inadmissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence. MRE 401. Even if relevant, however, the trial court may choose to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. MRE 403. "Evidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense." *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). The appropriate test for admissibility is logical relevance: whether the circumstances surrounding the weapon's discovery tended to establish defendant's connection to it. *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009). This requirement is not determined by legal technicalities but by using logic, common experience, and common sense. *Id.*

On the second day of trial, the prosecutor proffered Berryman's testimony, outside of the presence of the jury, to establish the link between defendant and an AK-47 clip found in the closet of a home on Algonquin Street. Before the proffer, Easley had testified that defendant wielded an assault rifle during the carjacking. Berryman testified that the AK-47 clip was found in a closet only three feet from the access point to the attic that defendant had used. Further, the clip was laying uncovered, "out in the open" on a shelf in the closet. The court found that defendant was in close proximity to the closet and the clip, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. Thus, the trial judge allowed Berryman to testify to his recovery of the clip after defendant's arrest.

Defendant argues that the prosecutor failed to establish an adequate foundation connecting the AK-47 clip to the crime and defendant. After Berryman's testimony, the trial judge found that the clip was discovered only three feet from where defendant had entered the attic in an attempt to hide from the police. The judge noted that the evidence was prejudicial, as is most evidence presented by the prosecutor, but its prejudicial effect did not substantially outweigh its probative value. The trial court did not clearly err in finding that the circumstances surrounding the AK-47 clip's discovery tended to establish defendant's connection to it. On the basis of the testimony of both Easley and Berryman, the trial court could reasonably conclude that the AK-47 clip was of the kind used in the offense with which defendant was charged, *Hall*, 433 Mich at 580, and that the close proximity of defendant's access point to the attic and the closet in which it was found showed a nexus between defendant and the clip, *Murphy (On Remand)*, 282 Mich App at 580. The trial court properly concluded that there was a sufficient nexus to show that defendant was in possession of the AK-47 clip at the time of his arrest. Further, though the clip was prejudicial, its admission in evidence was not *unfairly* prejudicial. See *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008)("Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." In light of Easley's testimony that defendant used an assault rifle like an AK-47during the carjacking, we conclude that the significant probative value of the evidence was not outweighed by the danger of unfair prejudice.

Finally, defendant argues that a new trial is necessary because the trial court erred in admitting for purpose of impeachment evidence of defendant's prior home invasion convictions. We conclude that defendant has waived review of this issue.

At trial, defendant stated that he wished to testify on his own behalf. After defendant so stated, defense counsel moved in limine to exclude mention of defendant's prior criminal convictions. The prosecutor argued that defendant's three convictions for home invasion and one conviction for receiving and concealing stolen property all had an element of theft, and therefore, were admissible under MRE 609. Defense counsel agreed that defendant could be impeached using his three prior home invasion convictions but argued that the prosecutor could not mention defendant's prior conviction for receiving and concealing stolen property because it was identical to one of the charged offenses. The trial court granted defendant's motion to exclude mention of his prior conviction for receiving and concealing stolen property.

Defendant has waived appellate review of this issue. At trial, defense counsel agreed with the prosecutor the defendant could be impeached with his convictions for home invasion. Waiver is the intentional relinquishment or abandonment of a known right. *People v Carines*,

460 Mich 750, 762 n 7; 597 NW2d 130 (1999). "'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.'" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's actions will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

Defense counsel explicitly stated that he agreed that the prosecutor could impeach defendant with evidence of his three prior convictions for home invasion. Defense counsel's agreement with the prosecutor that defendant's prior home invasion convictions could be used for impeachment purposes obviated the need for the trial court to analyze their probative value and prejudicial effect under MRE 609(a)(2)(B) and (b). "[A] party may not harbor error at trial and then use that error as an appellate parachute . . . ." *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010). Because defense counsel agreed to the admissibility of defendant's prior convictions, defendant has waived appeal of this issue.

We affirm.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey